CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, AUGUST TERM, 1819.

FULTON'S HEIRS vs. *GRISWOLD.*

APPEAL from the court of the sixth district.

The vendee cannot refuse payment of the price, nor can he require surety from the vendor, till suit be actually brought to evict him.

DERBIGNY, J. delivered the opinion of the court. This action is brought by the heirs and representatives of the late Alexander Fulton, to recover from William Griswold the first instalment of the price of some land by him purchased at the public sale of said Fulton's estate. Griswold refuses payment on the ground that the land by him bought is claimed by other persons. The evidence, however, is not that actions have actually been brought by such persons, but that they hold adverse titles, in consequence

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of which Griswold is exposed to be evicted. On that evidence the district judge thought it equitable that, before Griswold should be compelled to pay, his vendors should make him secure against eviction. From so much of his decision as requires from them this security, the heirs of Fulton have appealed.

It is a provision of our code, originating in the ancient laws of the country, that "when a purchaser is disquieted in his possession, by an action on mortgage or any other claim, he may suspend the payment of the price, until the seller has restored him to quiet possession, unless said seller prefers to give security." But the disturbance must be an actual disturbance, not an anticipated one: the danger of eviction must be that which arises from an actual suit, not from a suit which may hereafter be brought. Domat on that question has gone farther, when he said, "if before payment, the buyer discovers that he is in danger of eviction," &c. But the text of the Roman law does not warrant that interpretation; the expressions are, "*ante praetium solutum, dominii quaestione mota, praetium emptor solvere non cogitur, nisi fidejussores, &c. Dominii quoestionæ mota*, means not any discovery of danger on the part of the buyer, but an actual investigation of the title of

ownership; and is consonant with the provision of our code, which gives this remedy to the purchaser, only in case of a disturbance by an action on a mortgage or any other claim, or, as the French text expresses it, *par une action soit hypothecaire, soit en revendication.* So far, and no farther, does the law authorize the buyer to retain the purchase money: and, however hard may be some cases, in which an impending claim threatens the purchaser with eviction, it does not belong to courts of justice to extend to him the remedy which the law has limited to the case of actual disturbance by suit. Even before payment, says Pothier in is contract of sale, no. 282, if the buyer suffers no disturbance, he cannot require from the vendor any security for the price which is demanded of him. *Civ. Code*, 360, *art.* 85.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the appellant do recover from the appellee the sum of twelve hundred and fifty six dollars, with interest at ten per cent from the first day of March, 1818, and costs of suit.

Baldwin & Blanchard for the plaintiffs, *Porter* for the defendant.

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PHILLIPS vs. JOHNSON & AL.

PHILLIPS vs. JOHNSON & AL.

The payment of property, part of a succession, to a person declared heir to it, by the judgment of a court of competent jurisdiction, unappealed from, is valid, even after the judgment is reversed.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. A. Phillips, the plaintiff's brother, died intestate, leaving a large estate, real and personal, to which a curator was appointed, who brought suit against the defendants, as purchasers of a part of the real property of the estate.

During the late war, the present plaintiff, being an alien enemy, was prevented from instituting any action to obtain the estate.

In 1816, one James Rogers, for himself and others, as his co-heirs, applied to the court of probates to be recognised as heirs of the deceased, and they were accordingly admitted by a decree of that court, of the sixth of May of that year, on which day, the present defendants paid him the amount of the judgment obtained against them by the curator. On the next day, Rogers entered satisfaction of the judgment, on the re-record; and the curator appealed from the decree of the court of probates, which recognised Rogers and others as heirs of the estate.

In June following, Phillips, the present plaintiff, intervened in the appeal, and the dis-

trict court reversed the decree of the court of probates, and decreed Phillips, the then appellant, to be heir of the personal estate, and Rogers and others the then appellees to be heirs of the real. Ten days after, no appeal from this decision of the district court having as yet been taken, Rogers, for himself and his co-heirs, whose powers he had, acknowledged the payment of the amount of the judgment, obtained by the curator, against the present defendants.

In September, 1816, the present plaintiff appealed from the judgment of the district court to this; and in October, 1818 obtained a judgment reversing that of the district court, recognising Rogers and others as heirs of the real estate of the deceased, and declaring him to be heir of the whole estate, real and personal. 5 *Martin*, 700.

He then brought the present suit to recover the amount of the judgment, obtained by the curator, against the then and present defendants, for the amount of part of the real estate purchased by them. There was judgment against him and he appealed.

We are of opinion that the judgment is correct. The defendants having paid the amount of the real property to persons declared heirs by a competent tribunal, from whose judgment no

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appeal had been taken, after the time had elapsed, within which a suspensive appeal could have been taken, cannot be said to have made payment wrongfully, while the persons to whom they paid might have compelled payment by legal means.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff, *Johnson* for the defendants.

DAVIS vs. *TURNBULL & AL.*

One cannot be charged with goods on the testimony of a witness who was present when they were contracted for, though not at their delivery. Interest cannot be claimed, under the custom of merchants, when the goods do not appear to have been bought for the purpose of trade and the vendee is not a merchant.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The defendants appealed from a judgment rendered against them, on an agreement of theirs to pay a claim of the plaintiff against one John M. Martin.

The amount of the claim was proved by the plaintiff's bookkeeper, who exhibited an account of sundry goods furnished by the plaintiff to said John M. Martin, which he swore to be correct; observing, however, that two items therein, one of 77 dollars, the other of 55 dol-

lars were for goods delivered in the witness' absence, although those charged in one of them were goods contracted for in his presence. There was also in the account a charge of $191,49 for interest, which the witness deposed was due, according to the custom of merchants in the parish of Rapides.

The defendants' counsel urged that judgment had been erroneously given for the sums in these three items: there being no legal evidence in support of the two first, and the latter having been allowed, against the provisions of the statute, *Civ. Code*, 408, *art.* 32, and the decision of this court in the case of *Cavelier & al.* vs. *Collin's heirs*, 3 *Martin*, 188.

We are of opinion that the district court erred. The goods having been delivered in the absence of the witness, his deposition cannot charge the defendant with that amount. The circumstance of part of them having been contracted for in the witness' presence cannot avail, as it is by the delivery of the goods only that the party could become liable for them.

The plaintiff cannot claim interest, according to the custom of merchants, as the goods do not appear to have been purchased with a view to trade, but for the party's own use, and there is no evidence that he was a merchant.

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It is, therefore, ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the plaintiff do recover the sum of two thousand six hundred and twenty-six dollars and fifty-one cents, (the balance appearing to be due, after a deduction of the three items excepted to) with legal interest from this date, and costs in the district court; those in this to be borne by the plaintiff and appellee.

Baldwin for the plaintiff, *Porter* for the defendants.

PHILLIPS vs. *CARSON.*

Payment of *personal* property, belonging to the succession, to a person recognised as heir to the *real*, is invalid.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The late A. Phillips left a large real and personal estate, to which a curator was appointed, who, on the 22d of September, 1810, recovered a judgment against the then and present defendant, for the amount of the personal property of the estate, purchased by the latter.

During the late war, Thomas Phillips, brother of the deceased, was prevented from instituting any proceedings in order to obtain the estate, he being an alien enemy.

On the 16th of March, 1816, James Rogers and others whom he represented, were admitted by the court of probates, as heirs to the estate, but, on the succeeding day, the curator appealed, from the decision of the court of probates in this respect, to the district court. In June following, the plaintiff intervened, as a party appellant, in the district court, who, on the 25th of that month, reversed the judgment of the court of probates, and decreed that the said Thomas Phillips, the then appellant, "be received as heir at law of the late A. Phillips, as to the moveable effects which were of the said A. Phillips at the time of his death, and as to the immoveable property which was then of the said A. Phillips that the said James Rogers and others, the appellees, be admitted and received as heirs of the late A. Phillips, each of them to take a legal portion among themselves; and that the aforesaid persons, so admitted as heirs as aforesaid, be put in possession of the succession aforesaid, i. e. each of them of the portion thereof to which he is entitled as heir thereof; that the debts already paid by the succession be deducted from the shares of said heirs, in proportion to the share they take therefrom; and that those which yet remain due, as well as the costs and charges

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of the succession, be satisfied and discharged by said heirs, each in proportion to his respective share, and that the curator be dismissed from the administration and curatorship of said estate."

From this judgment Phillips appealed, on the 7th of September following, to this court, who, in October last, reversed it, and decreed the whole estate, real and personal, to him. *5 Martin*, 700.

He then brought the present suit, in order to recover the amount of the part of personal property of the estate, bought by the defendant, for which the curator had judgment in 1810. The defendant resisted his claim, on the ground that he had paid the amount of the judgment to James Rogers, on the 1st of July, 1816. This was not denied, but the plaintiff contended that Rogers had no legal capacity to receive it. There was judgment for the plaintiff, and the defendant appealed.

At the time of this payment, a judgment of the district court, rendered on the 21st of June preceding, had appointed James Rogers and others, whom he represented, as heirs of the real estate of the deceased. But the claim, the amount of which was then paid to him, related to the personal estate only, of

which the present plaintiff was recognized as heir, by the same judgment: Rogers was then without capacity to discharge the present and then defendant.

It is further urged, that the curator had no right to appeal from the judgment of the court of probates, which had admitted Rogers and his co-heirs, as heirs to the real and personal estate of the deceased, and finally that the judgment of the district court decrees to the present plaintiff the real estate, after the claims against it are paid.

If the curator had no right to appeal, the then appellees, Rogers and others, might have pleaded this matter and obtained the dismissal of the appeal; but they joined issue with him, pleading only that there was no error in the judgment, and as they would have had the benefit of the decision of the district court, if the judgment of the court of probates had been affirmed, they must be concluded by its reversal.

The district court, after reversing the judgment of the court of probates, decreed the then appellant and present plaintiff and appellee to be heir of the personal estate of the deceased, and Rogers and his co-heirs to be heirs of the real, The legal portions spoken of in the judg-

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ment are not those of the then contending parties, Phillips on the one part, and Rogers and others, on the other, in relation to each other; but the respective shares of Rogers and his coheirs among themselves. It appears to us that the judgment appealed from is perfectly correct.

It is, therefore, ordered, adjudged and decreed, that it be affirmed with costs.

Baldwin for the plaintiff, *Scott* for the defendant.

CURTIS vs. *MUSE & AL.*

If a tract of "100 acres, on the side of the lake," be sold out of a larger one, and the vendee locates himself on the whole front of the large tract on the lake, which is less than ten acres, running two perpendicular lines, to include 100 acres, if he does not take more than a fair proportion of the good and bad land, and improves the

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court. John Curtis, the appellant, is the owner of a tract of land, of nineteen hundred arpens, in or about the centre of which is situated a tract of one hundred arpens, sold by his vendors to the appellees. The expressions in the sale of this last tract are, "that it is situate and lying on the south-west side of the lake, in the tract of land containing two thousand arpens, bounded on one side by the bayou Castor, and fronting bayou Jean D'Jean." It does not appear that

this tract of one hundred arpens ever was measured out and located by the vendors to the appellees; but the appellees, under the description given in the deed of sale, caused it to be located so as to have its front on the south-west side of the lake. The difficulty between the parties is this: the appellant contends that it ought to be located in a square form; the appellees maintain that the manner in which they have located it is more equitable, because it gives them a proportionable share of good and bad land.

ground, he will not be removed afterwards on the allegation that he ought to have taken the land in a square form.

In a contest of this nature the first thing to examine is, whether the description given in the bill of sale is sufficiently certain to fix the situation of the land; for if it is, there is no occasion for any enquiry into the other circumstances of the case.

The land is said to lie on the south-west side of the lake; we take that to signify that it has its front on that side. Now, according to the plans exhibited and made a part of the record, the length of that side falls far short of the ten arpens front, which a location of one hundred arpens in a square form would call for; such a location then would not be conformable to the expressions of the sale. But taking the whole length of the south-west side of the lake for the

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front of the tract in question, and running perpendicular lines on each end till they include a superficies of one hundred arpens, is evidently the location intended by the deed; and that is the location which the appellees have caused to be made. If we add to this that the location, as insisted on by the appellant, would give to the appellees nothing but pine hills and swamps, and that, if left as already surveyed, it gives them a proportionable share of good land: if we farther take into consideration that one of the appellees has built, since more than two years, a saw-mill on the bayou which bounds that tract of land behind; and that more than one year was suffered to elapse before the appellant complained of any trespass; we will be more and more confirmed in the opinion, that the location, as made by the appellees, is not only conformable to the deed of sale, but agreeable to the understanding of the parties.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff, *Wilson* for the defendants.